PP v. SONY MALDUD & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
STEPHEN CHUNG J
[CRIMINAL APPEAL NO: BKI-42-AC-1-1-2013]
22 JANUARY 2015

CRIMINAL LAW: *Offences – Rape – Penal Code, s. 376(1) – Accused persons charged for raping retarded woman – Defence that victim had consented to sexual intercourse – Whether elements of rape satisfied – Whether prima facie case proved – Whether accused persons ought to be called to enter defence*

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal and discharge – Appeal by prosecution – Accused persons charged for raping retarded woman under s. 376(1) of Penal Code – Defence that victim had consented to sexual intercourse – Semen found on victim's clothing and undergarment – Accused persons acquitted and discharged without having to enter defence – Whether elements of rape satisfied – Whether prima facie case proved – Whether accused persons ought to be called to enter defence*

EVIDENCE: *Corroboration – Rape – Rape victim's evidence – Victim testified that accused persons raped her – Defence that victim had consented to sexual intercourse – Medical examination revealed fresh and old tears on victim's hymen – Semen found on victim's clothing and undergarment – Whether victim's testimony corroborated by other evidence*

In the Sessions Court, the second respondent ('the second accused') had initially faced two charges for rape against PW5, an offence under s. 375(b) of the Penal Code ('the Code'). In the first charge, the second accused was charged together with the fourth respondent ('the third accused') while in the second charge, he was charged together with the third respondent ('the fourth accused'). The first respondent, who was also charged for the same offence, had absconded while out on bail and could not be found or arrested to attend the trial. The two charges were amended from s. 375(b) to s. 376(1) of the Code and the accused persons pleaded not guilty to the amended charges. PW5, who was a retard, was on her way to her sister-in-law's house when she met the first accused who took her to a nearby forest and raped her. The first accused then introduced her to the second and third accused persons and they took turns to rape her. The next day, along with the first and second accused, the fourth accused raped her. PW5 further testified that she did not fight back or tried to run away because she was scared. The defence submitted that the intercourse was consensual because PW5 did it for money. At the conclusion of the trial, the Sessions Court Judge ('SCJ') held that a rape victim's evidence must be corroborated and in this case, the only evidence that afforded corroboration was the DNA report of the existence of semen of the three accused persons in the clothing and panties of PW5. The SCJ further opined that there was no credible evidence that the three

A accused persons had sexual intercourse with PW5 without her consent and it was possible that the sexual intercourse was with her consent as medical examination revealed no bruises on her body. The second accused was acquitted and discharged. Hence, the present appeal by the prosecution. The prosecution submitted that (i) based on the examination conducted on PW5, B fresh and old tears were found on PW5's hymen and bruises were also found on her posterior posture; and (ii) the trial judge failed to take into consideration the intellectual disability of PW5.

Held (setting aside decision of Sessions Court; calling second accused to enter defence before another judge):

C **(1)** It is a rule of practice in sexual offences that evidence must be corroborated. In a case of a conviction without corroboration, the court must be convinced by the evidence of the complainant before proceeding to convict. It is trite that whether corroborated or otherwise, the complainant's evidence must first be found to be credible. (para 19)

D **(2)** PW5 was able to testify in court about what happened to her. She was able to identify the three accused persons in the court during the trial. Therefore, she was a competent witness although she had some mental retardation. There was nothing in the SCJ's ruling that PW5 was not a competent witness or that she did not know what was right or wrong or E that she did not know what was a lie or the truth. (para 27)

(3) PW6 who carried out the DNA analysis testified that semen was found on the clothes of PW5 and that the semen found matched with the DNA of the blood specimen taken from the accused persons. PW1, who had F examined PW5, found fresh and old tears on the latter's hymen. Based on the evidence of PW6 and the testimony of PW5, the second accused had sexual intercourse with PW5 and had penetrated her. Her testimony had been independently and materially corroborated by the testimony of PW1 and PW6. (paras 32 & 33)

G **(4)** It was the first accused who had telephoned the second, third and fourth accused persons to come and rape PW5. She did not agree to being raped by the second, third or fourth accused persons. The SCJ had ruled that the prosecution had rebutted the contention of the accused that PW5 did it for the money. PW5 had testified that she did not fight back or tried H to run away because she was scared. The trial judge did not dismiss this piece of evidence. Having ruled as such, he could not come to the conclusion that it was consensual. (paras 34 & 35)

Case(s) referred to:

Ab Malek Atan v. PP [2002] 6 CLJ 405 HC ***(refd)***
I *Din v. Public Prosecutor [1964] 1 LNS 33 FC* ***(refd)***
Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 CA ***(refd)***
Md Amin Lajat lwn. PP & Kes Yang Lain [2012] 1 LNS 919 HC ***(refd)***
PP v. Chan Wai Heng [2008] 5 CLJ 805 CA ***(refd)***
Tan Thong Jin v. PP [2002] 3 CLJ 552 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 118
Penal Code, ss. 375(b), 376(1)

For the appellant - Afzan Abd Kahar; DPP
For the respondents - Arthur Bonnie; M/s Tan, Jack Arthur & Co

Reported by Najib Tamby

JUDGMENT

Stephen Chung J:

[1] There are two charges against the respondent Borhan bin Lajaidaru, the second accused in the trial in the Sessions Court, for rape against PW5. In the first charge, he was charged for an offence of rape committed on 5 March 2011 against PW5 under s. 375(b) of the Penal Code together with another accused, Sahilansah bin Sakilan (third accused). In the second charge, he was charged for an offence of rape committed on 6 March 2011 against PW5 under s. 375(b) of the Penal Code together with an accused Mohd Herry bin Mujalah (fourth accused).

[2] Another accused, Sony Maldud (first accused) was also charged for an offence of rape committed against PW5 on 5 March 2011. This charge was to be heard together with the two charges. However, he had absconded while out on bail and could not be found or arrested to attend the trial.

[3] The two charges were amended from s. 375(b) to s. 376(1) of the Penal Code and they pleaded not guilty to the amended charges. Both amended charges against the three accused were heard together. All three accused were represented by a counsel.

[4] The two amended charges against the second accused read as follows:

2nd charge:

> Bahawa kamu, pada 05 Mac 2011, jam lebih kurang 5.00 petang, bertempat di Kg. Tajau Laut dalam daerah Kudat di dalam Negeri Sabah telah melakukan kesalahan iaitu telah merogol penama Habiana bt. Halibun, KPT/900813-12-5542 didalam sebuah lori, no. pendaftaran SK 7888, dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum dibawah Sek. 376(1) Kanun Keseksaan.

3rd charge:

> Bahawa kamu, pada 06 Mac 2011, jam lebih kurang 5.00 petang, bertempat di Kg. Kimihang dalam daerah Kudat di dalam Negeri Sabah telah melakukan kesalahan iaitu telah merogol penama Habiana bt. Halibun, KPT/900813-12-5547 didalam sebuah lori, no. pendaftaran SK 7888, dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah Sek, 376(1) Kanun Keseksaan.

[5] On 17 January 2013, at the end of the prosecution's case, the trial judge made the ruling that the prosecution had failed to make out a *prima facie* case against all three accused who were then acquitted and discharged. The prosecution has filed an appeal against the decision of the trial judge.

[6] In this appeal, after several attempts, the other two accused could not be found and could not be served with the notice of appeal. The prosecution and counsel agreed to proceed with the appeal against the respondent. The grounds of the appeal are set out in the petition of appeal. I shall deal with grounds together. In this appeal, I shall refer to the respondent and the other accused as the first, second, third and fourth accused respectively as they were referred to in the trial in the Sessions Court.

[7] From the record of appeal, on 5 March 2011, at about 9pm, PW3 lodged a police report *via* KDT/RPT/0604/11 that her daughter PW5 did not come home after she left the house in the morning at about 7.30am. This report was not tendered as exhibit. On 6 March 2011, at about 7.30pm, PW5 arrived home. She was questioned by her mother (PW3) and subsequently told her mother that she was brought by three men whom she did not know but could identify them and that one of them admitted to her that he was the son of Sakilan. She told her mother that these three men had raped her. On 6 March 2011, at about 8.15pm, PW3 lodged a police report about the rape. This report was tendered as exh. P3. Subsequently, all four accused persons were arrested for the rape: see police reports which were tendered as exhs. P19 and P20.

[8] PW5 testified that on 5 March 2011, while she was going to the house of her sister-in-law, she met the first accused who took her to a nearby forest where she was raped. She said the first accused then introduced her to the second and third accused and they took her to a graveyard at Kg. Tajau where they took turn to rape her. Later, they took her to Kota Kinabalu. She said the next day, they took her to Kg. Kamiang, Kudat where the first, second and fourth accused raped her.

[9] In his ruling, the learned trial judge said that the question he had to consider was whether the sexual intercourse was against PW5's will and he stated that it was incumbent on the prosecution to prove that the intercourse took place without the consent of PW5.

[10] The defence submitted that the intercourse was consensual and that she did it for money. The trial judge ruled that in this respect, the prosecution had adduced evidence in rebuttal through PW5 where she had disagreed with the suggestion of counsel. PW5 testified that she did not fight back or tried to run away because she was scared.

[11] Notwithstanding that, the trial judge stated that he had to be extra cautious of the evidence given by PW5 especially when she had initially told her mother that she did not come home on 5 March 2011 because she got

herself locked in a toilet at a bus station in Sikuati and did not tell her mother that she had been raped. He said there was evidence that she had followed the first accused when invited.

[12] The trial judge said that it is a rule of practice that a rape victim's evidence must be corroborated. Having said that, he ruled that a conviction based on uncorroborated evidence is not illegal but that the judge must warn himself of the danger of convicting the accused on such evidence. He then ruled that the only evidence that afforded corroboration was the DNA report which showed the existence of semen of the three accused in the clothing and panties of PW5. He stated that the mere presence of such semen did not necessarily indicated that she was raped and that it was possible that the sexual intercourse was with her consent as there was no bruises noted on her body when the doctor (PW1) examined her.

[13] At the end of his ruling, the trial judge concluded that there was no credible evidence that the three accused had sexual intercourse with PW5 without her consent.

[14] Counsel for the second accused submitted that the trial judge was correct in his decision as he had taken great precaution in reminding himself of the condition of PW5 when giving evidence during the trial: see p. 82 of the record of appeal.

[15] The prosecution submitted that the trial judge had erred because from the evidence adduced, the prosecution had established the ingredients of the charges as recorded in PW5's testimony at p. 31-32 of the appeal record. It was submitted that PW5's evidence was corroborated by PW1 and PW6.

[16] It was submitted that according to PW1 (at p. 9 of the appeal record) that based on the examination conducted on PW5 she found fresh and old tears on PW5's hymen and also found bruise on her posterior posture. It was submitted that according to the DNA analysis (exh. P5) carried out by PW8, she found the semen of all the accused persons in the clothing and underwear of PW5.

[17] The prosecution also submitted that the trial judge had erred in law and in fact by failing to take into consideration the intellectual disability of PW5, although PW2 in her report (tendered as exh. P2) stated that PW5 has some intellectual disability. The prosecution submitted that the appeal should be allowed.

[18] In this appeal, the question is whether the second accused had raped PW5 on the two occasions as per the two amended charges made against him. As stated above, the trial judge came to the finding that he had doubts and did not accept the testimony of PW5. He concluded that there was no credible evidence that the three accused had sexual intercourse with PW5 without her consent.

[19] It is a rule of practice in sexual offences that the evidence must be corroborated. In a case of a conviction without corroboration, the court must be convinced by the evidence of the complainant before proceeding to convict. It is trite that whether corroborated or otherwise, the complainant's evidence must first be found to be credible: *Ab Malek Atan v. PP* [2002] 6 CLJ 405. The crux of this appeal is on the credibility of PW5.

[20] An appellate court should be slow to interfere with the finding of fact by a lower court because it does not have the advantage of seeing and hearing the witnesses and hence of assessing their credibility: *PP v. Chan Wai Heng* [2008] 5 CLJ 805; [2008] 5 MLJ 798. Generally, the appellate court will defer to the conclusion which the trial judge has formed on the trustworthiness or credibility of a witness whom he has seen.

[21] An appellate court in order to reverse the finding of the lower court, must not merely entertain doubts whether the decision below is right but must be convinced that it is wrong. In order to be convinced that the decision of the trial judge is wrong, an appellate court has a duty to check by critical examination of the whole evidence on his conclusion as to the truthfulness of that witness, including whether the witness's story is inherently consistent with the facts and circumstances of the case, the probability of the story, the demeanour and tone in which the witness gives evidence and whether there is credible circumstantial evidence and or corroboration: *Lee Kwai Heong & Anor v. PP* [2006] 1 CLJ 1043. An appellate court has a duty to intervene in a case where the trial judge has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion: *Tan Thong Jin v. PP* [2002] 3 CLJ 552.

[22] Although it was not recorded in the notes of proceedings, it was stated in the ruling of the trial judge and during the hearing of this appeal, both the DPP and counsel confirmed that at the commencement of trial, the prosecution had informed the trial judge that PW5 had intellectual disability, a slow learner and had difficulty in understanding and answering questions, in particular long or complex questions. These could be seen from her answers 'tidak tahu' to the several questions asked of her at the beginning of her evidence in chief (see pp. 28 to 31 of record of appeal). The prosecution applied for a short stand down before the trial continued. After that, PW5 was able to and had given evidence at the trial. There was no allegation that during the stand down or before or at any time during the trial that she had been influenced or induced or promised or coached to give evidence against any of the accused.

[23] Section 118 of the Evidence Act 1950 (EA) states that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body

or mind, or any other cause of the same kind. In the Explanation under this section, a mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

[24] At the time of the alleged rapes, PW5 was 20 years of age. In April and May of 2011, she was interviewed and assessed by PW2, a consultant psychiatrist at Hospital Mesra, Bukit Padang, Kota Kinabalu, who prepared a report on her assessment which was tendered as exh. P2. PW2 found that PW5 initially became a little anxious when talking to someone whom she was not familiar or not comfortable with but after a while when better rapport was built, she calmed down. These would explain her behaviour and answers at the beginning of her testimony and after the stand down.

[25] PW2 testified that she found PW5 had mental retardation with moderate IQ of 49, had major difficulty performing complex task and difficulty understanding complex and long questions but was able to answer if the questions were short and simple and could give short simple answers too. In her report, PW2 said that PW5 knew what was wrong and what was right and could differentiate a truth and a lie. She also said PW5 was able to recognise persons that she met before by face but was unable to identify specifically by name.

[26] In his grounds of decision, the trial judge had stated that when PW5 took the witness stand, he asked her some preliminary questions to verify whether she understood the nature of oath but unfortunately PW5 kept quiet. He said in any case he allowed her to give sworn statement. Although he did not specifically rule as such, it was clear that he had allowed and accepted PW5 as a competent witness.

[27] Reading the record of appeal, in particular the testimony of PW2, PW3 and PW5, PW5 was able to testify in court about what happened to her on those dates and about what the accused persons did to her. The record showed that she was able to identify the three accused in court during the trial. Therefore, she was a competent witness although she had some mental retardation. There was nothing in his ruling that PW5 was not a competent witness or that she did not know what was right or wrong or that she did not know what was a lie or the truth. This was not really an issue during the trial. To him, the issue was the credibility of PW5 as a witness: see *Md Amin bin Lajat lwn. PP & Kes Yang Lain* [2012] 1 LNS 919; [2013] 8 MLJ 824.

[28] Reading the record of appeal, PW5 testified that she met the first accused who brought her to a forest and raped her. After that, he telephoned the second and third accused and both of them arrived. Later the fourth accused arrived and they took her to Tajau where they took turn to rape her (see p. 31 of record of appeal). At p. 32 thereof, PW5 testified that the second accused raped her. She said the second accused 'buka' her 'seluar panjang

A hitam' and penetrated her. She said although she did not see him inserting his penis into her, she felt it and felt pain when he penetrated her. She said after that, it was the third accused and followed by the fourth accused who raped her.

B **[29]** PW5 testified that they then brought her to Kota Kinabalu in a lorry where they stayed overnight in the lorry and then brought her to a beach at Kudat where the first accused 'buka her seluar, baju tidak dibuka' and raped her, followed by the second accused and the fourth accused. After that, they dropped her near to Bank Giro and she made her way home where she was questioned by PW3 why she did not come home the night before. Initially C she told PW3 that she got herself locked in the toilet but admitted that she had been raped after PW3 questioned her further.

[30] Did this amount to a lie which led the trial judge to doubt her testimony and credibility? I have heard many appeals on rapes. Some witness would immediately tell her parent or someone whom she trusted about the D rape, some would delay before making a decision to tell her parent or someone for reasons best known to her whilst some would deny out of shame or fear or threats or punishments before telling her parent or someone, especially if she was being questioned and whether she was of tender age or has some disability.

E **[31]** From the record of appeal, PW5 had initially denied but admitted that she had been raped after her mother continued to question her. The evidence showed that she arrived home at about 7.30pm and her mother lodged the police report at about 8.15pm, shortly after she admitted to her mother that she had been raped after being questioned. That could not amount to a lie, F unless she continued to deny that she was raped but was only caught lying during examinations in court, which was not the case here.

[32] Based on the record of appeal, PW5 had identified the second accused as one of the persons who had raped her on 5 March 2011 and on 6 March 2011 respectively. The record of appeal showed that after the police report G had been lodged, the clothes of PW5 were collected and sent to the government chemist for DNA analysis. After the accused were arrested, their blood specimen were taken and sent to the government chemist for the DNA analysis (see exhs. P27, P28 and P29). PW6 who carried out the DNA analysis testified that semen was found on the clothes of PW5 and that the H semen found matched with the DNA of the blood specimen taken from the accused persons (see exh. P5). In particular, the semen of the second accused was found on the panties of PW5. These confirmed the presence of the semen of the second accused on the clothes of PW5.

I **[33]** PW1 had examined PW5 on 7 March 2011 and he found a fresh tear at six o'clock and old tears at three and nine o'clock in the hymen of PW5 (see exh. P1). Based on this piece of evidence, the evidence of PW6 and the testimony of PW5, the second accused had sexual intercourse with PW5 and

had penetrated her. Her testimony had been independently and materially corroborated by the testimony of PW1 and PW6. These two ingredients had been established by the prosecution.

[34] The question is whether it was against her will or without her consent. As stated above, the trial judge ruled that it was consensual because based on evidence, he came to the conclusion that PW5 followed Sony (first accused) when invited. It must be emphasised that PW5 in agreeing to follow the first accused did not necessarily mean that she had consented to sexual intercourse with the first accused. Based on the evidence adduced, in particular the testimony of PW5, no such inference could be drawn that she consented to the sexual intercourse. In any event, she did not follow the second, third and fourth accused on 5 March 2011. It was the first accused who telephoned them to come and they raped her. She did not agree to being raped by the second, third or fourth accused.

[35] As stated above, the trial judge had ruled that the prosecution had rebutted the contention of the accused that PW5 did it for money. PW5 had testified that she did not fight back or tried to run away because she was scared. The trial judge did not dismiss this piece of evidence or that PW5 was lying in this respect and there was no evidence to the contrary. Having ruled as such, he could not come to the conclusion that it was consensual.

[36] PW5 also testified that she did not agree with what they did to her. She said she was forced. She said she did not know the first accused but he brought her, telling her he was taking her by short cut to go back to her house. Obviously he was taking advantage of her, bearing in mind her mental retardation (see p. 32 of record of appeal). Based on her testimony that she did not fight back or tried to run away because she was scared, and PW1 had found bruises on PW5, obviously the sexual intercourse was against her will, without her consent and could not be consensual. His finding that it was consensual was against the weight of the evidence. Therefore, the trial judge had fundamentally misdirected himself on the law and the facts before him and had erred.

[37] Reading the record of appeal, the prosecution has established that there was sexual intercourse between the second accused and PW5, that there was penetration and that it was against her will and without her consent. The *factum* of rape had been established: *Din v. Public Prosecutor* [1964] 1 LNS 33; [1964] 1 MLJ 300. For the reasons given, the prosecution had made out a *prima facie* case against the second accused. The decision of the trial judge in acquitting and discharging the second accused is hereby set aside and the second accused is called to make his defence before another judge.